

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

Case Number: 1:12-cv-00257-JB-LFG

LARRY GOLDSTONE, CLARENCE G. SIMMONS,
III, and JANE E. STARRETT,

Defendants.

**DEFENDANTS LARRY GOLDSTONE AND CLARENCE G. SIMMONS'S RESPONSE
TO PLAINTIFF'S WITHDRAWAL OF RELIANCE ON CITED AUTHORITY**

Plaintiff's Withdrawal of Reliance on Cited Authority [Doc. #72] disavowed its prior reliance on *In re General Electric Company Securities Litigation* ("GE"), No. 09 Civ. 1951, 2012 WL 90191 (S.D.N.Y. Jan. 11, 2012), because the court determined, on reconsideration, that an October 1, 2008 statement by Jeffrey Immelt about GE "successfully" meeting "commercial paper needs" was an inactionable opinion, reasoning that the complaint lacked allegations that Immelt "disbelieved [the statement] at the time he expressed it." *See In re General Electric Company Securities Litigation*, No. 09 Civ. 1951, 2012 WL 1371016, at *9 (S.D.N.Y. Apr. 18, 2012). Rather than simply withdraw its reliance, however, Plaintiff attempts to make substantive arguments about the later opinion. Defendants file this response to dispel any misunderstandings created by Plaintiff's initial reliance on an overruled case.

First, *GE* reversed its previous denial of the defendants' Rule 12(b)(6) motion despite particularized factual allegations that (a) Immelt admitted privately to Treasury Secretary Paulson in September 2008 that "GE was having difficulty issuing commercial paper for terms longer than overnight," and (b) "the commercial paper markets were 'frozen' as of September

25, 2008.” 2012 WL 90191 at *16. These allegations were held facially insufficient to satisfy the subjective falsity requirement. 2012 WL 1371016 at *9.

This reasoning demonstrates that the SEC cannot plead subjective falsity merely by alleging facts that “undermine” an opinion’s reasonableness. *GE*, 2012 WL 90191, at *33. Here, as in *GE*, the Complaint alleges nothing more than a laundry list of contentions that Plaintiff claims undercut the wisdom of Defendants’ OTTI judgment (§§ 33-38, 49-52, 69). They do not establish subjective falsity.

Second, *GE* acknowledged the importance of evaluating opinion statements “in context.” 2012 WL 1371016, at *10. Specifically noting *GE*’s risk warnings about “market disruption and volatility,” the court concluded that *GE*’s statement that the commercial paper markets might not “continue to be a reliable source of short-term financing” was an opinion which was not alleged to be subjectively false and which “in context [was] not misleading.” *Id.* This is analogous to the extensive risk disclosures and explanation of the basis for the OTTI judgment in Thornburg’s 10-K. Considered in this context, Defendants’ OTTI judgment cannot be considered misleading.

Dated: September 21, 2012

Respectfully submitted,

/s/ Randall R. Lee

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 21, 2012, the foregoing *Response to Plaintiff's Withdrawal of Reliance on Cited Authority* was electronically filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record:

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